86-1298

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

J. LAWRENCE WRIGHT and CLETA WRIGHT

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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and Cleta Wright
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Petitioners
Pro Se

Dated: February 6, 1987

QUESTIONS PRESENTED FOR REVIEW

ISSUE 1:

Did the Ninth Circuit Court of Appeals commit error in failing to rule that the Sixteenth Amendment, the Federal Income Tax Amendment which is the basis of the congressional power to tax the "incomes" of private, natural born, individuals, was never ratified and made a part of the United States Constitution and that the fraud present in the ratification of the Sixteenth Amendment renders it null and void and of no power and effect against these appellants?

ISSUE 2:

Is Section 205, revised Statutes of the United States, which authorized the United States Secretary of State to proclaim and certify that an amendment to the U.S. Constitution had been adopted, unconstitutional as conferring upon such

executive branch officer an undelegable power of the legislative branch?

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1. The caption in the style of this writ contains the names of all the parties to this proceeding, such parties being J. Lawrence Wright, Cleta Wright and the Commissioner of Internal Revenue.

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The Petitioners, J. Lawrence Wright and Cleta Wright, herein The Wrights, request that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, which affirmed the Tax Court's decision on the basis that the "Secretary

of State's certification that the sixteenth amendment was properly ratified is 'conclusive upon the courts.'"

The Wrights' appeal to this Honorable Court involves solely a challenge to the ratification in February, 1913, of the Sixteenth Amendment to the United States Constitution, which alleged amendment authorized Congress to impose a direct tax known as the income tax without the same being subject to the regulations concerning apportionment as contained in the U.S. Constitution.

Regarding Issue 1, The Wrights argument is supported by some, but not all, of the evidence related to the ratification, or lack thereof, of the challenged amendment, but such evidence is clearly sufficient to show that the amendment in question was not ratified by the requisite number of states and

further that the amendment was fraudulently and unlawfully certified as having been ratified.

Regarding Issue 2, The Wrights' argument centers on the unconstitutionality of Revised Statute, Section 205, for reasons of excessive and undelegable powers of the legislative branch to the executive branch, which allowed Secretary of State Knox to make legislative decisions and issue a fraudulent certification of ratification of the Sixteenth Amendment based on those legislative decisions. The question thus presented to this Court is of monumental significance and challenges the lawful power of Congress to collect an income tax in this nation in the method employed today. The personal and corporate income tax imposed by Title 26, U.S.C., is entirely dependent upon the Sixteenth

Amendment which is challenged by The Wrights.

To date, the question presented for review has been considered by the U.S. Court of Appeals for the Seventh and Ninth Circuits as being a political question upon which such courts could not rule. However, The Wrights argue that this question clearly presents a judicial question plainly falling within the confines of the definition of a judicial question, particularly as noted by this Court in Goldwater v. Carter, 444 U.S. 996, 100 S.Ct. 533 (1979) and Bowsher v. Snyar, 54 Law Week 5064 (U.S.S.Ct. July 7, 1986).

OPINIONS BELOW

The official opinion, entitled "Memorandum", of the Ninth Circuit Court of Appeals, submitted July 22, 1986, which

affirmed the Tax Court, is included herein as part of the Appendix, page A-29. This Memorandum of decision is based solely on the published opinion of United States v. Leland G. Stahl, 792 F.2d 1438 (1986), included herein as part of the Appendix, page A-17.

The order denying The Wrights' Petition for Rehearing and Suggestion of Rehearing En Banc was entered November 13, 1986 and is included herein as part of the Appendix, at page A-57.

JURISDICTION

Jurisdiction of the appellate court was pursuant to 26 U.S.C., Section 7483. The opinion in the appellate court was entered by memorandum on September 15, 1986, and Petitioners' timely filed Petition for Rehearing was denied on November 13, 1986. This court's

jurisdiction is invoked pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article V. U.S. Constitution:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislature of two thirds of the several States, shall call a convention for proposing amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Sixteenth Amendment, U.S. Constitution:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Section 205, Revised Statutes of the United States:

> "Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forth with cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

26 U.S.C., Section 7442:

> "The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by Chapter 1, 2, 3 and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87) or by laws enacted subsequent to February 26, 1926."

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE LOWER COURTS

This was an action brought by The Wrights in United States Tax Court to defend from a ninety (90) day letter from the Internal Revenue Service.

By way of defense to said ninety (90) day letter, The Wrights placed the United States Tax Court, and its officers, on constructive notice of fraudulent certification of the Sixteenth Amendment to the United States Constitution and demanded an Evidentiary Hearing for the purpose of proving said fraud by way of certified documentation of newly discovered evidence.

The Tax Court refused to allow the Evidentiary Hearing and denied The Wrights the opportunity to introduce evidence as an OFFER OF PROOF of a crime and fraud relating to the subject matter

jurisdiction of Respondent Commissioner of Internal Revenue Service.

The Tax Court entered a judgment against The Wrights on July 24, 1985 and Notice of Appeal was filed on September 25, 1985.

Although this case is civil in nature, The Wrights' appeal trailed a criminal case then pending in the Ninth Circuit Court of Appeals including the same issue. That case was an appeal from conviction of three counts of willful failure to file tax returns under 26 U.S.C., 7203 and one count of false statement on a tax return under 26 U.S.C. 7206 (1), and was captioned United States of America v. Leland G. Stahl, Case No. 85-3069.

On June 30, 1986, the Ninth Circuit affirmed the District Court in Stahl in a published opinion, a copy of which is

attached hereto in the Appendix, page A-17.

On September 15, 1986, the Ninth Circuit affirmed the Tax Court's decision in the instant case, on the basis of Stahl, in a Memorandum, a copy of which is attached hereto in the Appendix, page A-29.

On November 13, 1986, the Ninth Circuit denied the Petition for Rehearing, a copy of the denial is attached hereto in the Appendix, page A-57, whereupon The Wrights file this Petition for Certiorari.

B. STATEMENT OF FACTS PERTINENT FOR THIS WRIT

The only issue being raised in this writ concerns the alleged ratification of the Sixteenth Amendment to the U.S. Constitution. This issue was raised in the Tax Court by The Wrights to dismiss

the claims of Respondent on grounds that the challenged amendment had not been ratified by the requisite number of states and further that Secretary of State Philander Knox had unlawfully and fraudulently certified that said amendment had been ratified.

In support of said motion, The Wrights demanded an Evidentiary Hearing for purposes of presenting certified copies of documentation obtained from the National Archives in Washington, D.C., including certified copies of the legislative journals from the States of Kentucky, Illinois, Georgia, California and Missouri. The Tax Court refused to allow the Evidentiary Hearing and denied The Wrights the opportunity to introduce an offer of proof of the following:

On July 12, 1909, the United States Congress adopted Senate Joint Resolution

40, which proposed to the various state legislatures of the States of our nation the following described amendment to the U.S. Constitution:

> "Article XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Subsequently, on July 27, 1909, the same Congress adopted Senate Concurrent Resolution 6, which requested the President to send certified copies of S.J.R. 40 to the governors of all states. Pursuant to this resolution, Philander C. Knox, Secretary of State, transmitted to each governor such certified copy of the resolution proposing the amendment. Between August, 1909, and February 15, 1913, the various state legislatures took action in reference to the proposed amendment.

In 1910, the legislature of Kentucky had pending before it the proposed constitutional amendment. On January 26, 1910, the Kentucky House adopted House Resolution 4, a resolution to adopt the amendment. On February 8, 1910, House Resolution 4 was considered by the Kentucky Senate, but it was rejected by a vote of 22 to 9. After the defeat of this first resolution, the House attempted again to secure the adoption of this amendment and enacted on February 23, 1910, House Resolution 20, which was another resolution adopting the proposed amendment. On March 15, 1910, the Kentucky Senate refused to consider this second resolution. The Kentucky Senate never did ratify the Congressional resolution proposing the Sixteenth Amendment.

On February 9, 1910, the Illinois Senate adopted Senate Joint Resolution 7;

this resolution omitted the preamble of the Senate Joint Resolution 40 of the U.S. Congress. Thereafter, on March 1, 1910, the Illinois House adopted this resolution. In effect, the legislature of Illinois adopted a resolution different from that proposed by Congress; the Illinois resolution completely omitted the preamble of the Congressional resolution, it failed to capitalize the word "States" as it appears in the Congressional resolution, and further, the Illinois resolution amended the last word in the Congressional amendment, the word "enumeration", and changed it to "renumeration".

In 1909, the Senate of Georgia had tabled Senate Resolution 23, which was such a resolution to accept the amendment. In the next year, on July 11, 1910, the Georgia Senate may, or may not,

have adopted either this resolution, or another one numbered 38. However, notwithstanding which resolution was adopted by the Georgia Senate, when that resolution appeared upon the Georgia House floor on July 12, 1910, another resolution was offered as a substitute and the House adopted the substitute resolution. Thus, the legislative journals of Georgia reveal that neither house adopted a resolution which was likewise accepted by the other house. But, brushing aside the problem concerning a lack of concurrence by both houses of the Georgia legislature in the same resolution, the resolution of Georgia which was sent to Washington clearly reveals that the amendment proposed by Congress was itself amended by the Georgia legislature. The preamble of the Congressional resolution was modified; in the body of the amendment it-

self, the word "levy" was substituted for the word "lay"; the word "incomes" was amended to "income"; the word "source" was changed to "sources"; and commas were omitted from the amendment. Plainly, the Georgia legislature did not concur with the amendment proposed by Congress.

On January 23, 1911, the California Senate adopted Senate Joint Resolution 2, which was an amended version of the amendment proposed by Congress. After this resolution was adopted, it was transmitted to the California House. On January 31, 1911, the California House may, or may not, have adopted the resolution; the problem with the vote in the California House is that the vote on the resolution doesn't appear in the House journal notwithstanding the fact that the Constitution of the State of California compels the showing of votes in the jour-

nals. Still, the amendment allegedly accepted by the California legislature was not the one proposed by Congress. The Congressional preamble was substantially changed; the first word of the amendment, the word "The", was deleted as were commas in the body of the amendment; the word "States" in the Congressional resolution was not capitalized in the California resolution; and the last phrase of the Congressional amendment, the phrase "census or enumeration" was amended to "census enumeration". Thus, the California legislature failed to adopt the amendment proposed by Congress.

On March 3, 1911, Senate Joint and Concurrent Resolution 8, an amended version of the resolution adopted by Congress, was adopted by the Missouri Senate. The Senate resolution was then transmitted to the Missouri House and on

March 16, 1911, the House substituted its own resolution regarding the Sixteenth Amendment for the Senate resolution and adopted the amended resolution. The amended resolution was then transmitted to the Senate, where on the following day, it is alleged that the Senate adopted an amended title to the resolution. However, the Senate journal reveals no vote on this action notwithstanding the command of the Missouri Constitution to record such vote. Whether or not the same resolution was adopted by both Missouri houses, the resolution sent to Washington was an amended version of what Congress proposed. The Missouri resolution omitted the preamble of the Congressional resolution; the words "Congress" and "States" as appeared in the Congressional resolution were not capitalized; and the word

"lay" as it appeared in the Congressional resolution was amended to the word "levy". Clearly, the State of Missouri accepted a resolution different from what was proposed by Congress.

In February, 1913, the legislature of Wyoming apparently adopted the resolution proposed by Congress; on February 3, 1913, the Governor of Wyoming sent to Secretary of State Philander Knox a telegram informing Knox of the purported adoption of the Sixteenth Amendment by Wyoming. The following day, Knox responded by telegram and informed the Governor that a certified copy of the Wyoming resolution had to be sent to him in order to comply with section 205 of the Revised Statutes. While Knox demanded such a certified copy of the Wyoming resolution, he failed to make a similar demand of the legislature of

Minnesota, which never sent anything to Knox. Knox counted Minnesota as a state which ratified the Sixteenth Amendment nonetheless.

By early February, 1913, Secretary Knox had many state resolutions concerning the Sixteenth Amendment in his possession. However, his office reviewed these resolutions and determined that severe problems existed.

On February 15, 1913, the Solicitor of the State Department prepared a memorandum explaining the problems concerning the alleged ratification of the Sixteenth Amendment and sent the same to Knox. The Solicitor noted that Minnesota had sent no certified copy of any resolution its legislature adopted to the State Department. He further noted:

> "In the certified copies of the resolutions passed by the legislatures of the several states ratifying the proposed 16th amendment, it appears that

> only four of these resolutions (those submitted by Arizona, North Dakota, Tennessee, and New Mexico) have quoted absolutely accurately and correctly the 16th Amendment as proposed by Congress. The other thirty-three resolutions all contain errors either of punctuation, capitalization, or wording. Minnesota, it is to be remembered, did not transmit to the Department a copy of the resolution passed by the legislature of that state. The resolutions passed by twenty-two states contain errors only of capitalization or punctuation, or both, while those of eleven states contain errors in the wording."

Thereafter, the Solicitor noted the amendments to the Sixteenth Amendment made by the States of Illinois, Georgia, California and Missouri shown above. In addition to other amendments made by other states, he noted that the Oklahoma legislature had amended the phrase "without regard to any census or enumeration" as it appeared in the Congressional amendment to read "from any census or enumeration".

In the same memo, the Solicitor demon-

strated his knowledge of the legal maxim that legislative bodies must concur completely with each other in order to enact any law. He noted that this same principle applies to the adoption of an amendment to the U.S. Constitution, wherein the states must concur precisely with the amendment proposed by Congress. The Solicitor's words are as follows:

> "Furthermore, under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment."

On March 4, 1909, the U.S. Congress adopted a revised criminal code for the federal government; one section of this code, found at 35 Stat. 1095, made it penal for anyone to make false, fictitious or fraudulent statements to any agency of the federal government. Another section, found at 35 Stat. 1107,

made it penal for any public official to make a written false certification; both of these laws are now found at 18 U.S.C., sections 1001 and 1018. Secretary of State Knox violated both of these laws when he, on February 25, 1913, falsely and fraudulently certified that 38 states had adopted the Sixteenth Amendment when in fact they had not.

Uncontroverted proof of the foregoing was presented to the Ninth Circuit Court of Appeals for consideration in its decision of United States of America vs. Leland G. Stahl, Appendix, page A-17, attached hereto; however the Ninth Circuit affirmed the Tax Court decision in the instant case based solely on its prior decision in Stahl.

REASONS FOR GRANTING THE WRIT

The question presented herein has, to

date, been the subject of several decisions by the Courts of Appeals for the Seventh and Ninth Circuits, as well as District Courts in the Northern District of Illinois. The first published opinion regarding this issue was rendered in United States v. Wojtas, 611 F. Supp. 118 (N. D. Ill., 1985), wherein the District Court held this issue to be a political one; the same rationale was followed in United States v. Thomas, 611 F. Supp. 881 (N.D. Ill., 1985). Subsequently, in United States v. Foster, 789 F.2d (7th Cir., 1986), and United States v. Thomas, 788 F.2d 1250 (7th Cir., 1986), this issue was held to be both a political question and one which could not be addressed because too much time had passed since the adoption of the challenged amendment and the courts had relied upon the validity of the amendment. It must be noted

that the above cases all in the Seventh Circuit, had little or no evidence presented in support of the issue and argued the issue obliquely on appeal.

There exist two cases wherein the issue presented herein has been adequately supported by proper evidence as well as fully argued on appeal. These cases are United States v. Ferguson, 793 F.2d 828 (7th Cir., 1986), and United States v. Stahl, 792 F.2d 1438 (9th Cir., 1986). In these cases, full evidence and arguments were presented, and Wojtas, Thomas and Foster were attempting, without proper foundation, to rely upon both Ferguson and Stahl to "blaze the trial", so to speak, on this issue. However, the cases which were relying upon Ferguson and Stahl were decided first and thus became precedence for deciding Ferguson and Stahl.

Ferguson and Stahl were primarily decided on the basis that the issue regarding the ratification of the Sixteenth Amendment is strictly a political issue. However, the paramount cases on the issue of what is a political question are Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691 (1962), Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944 (1969), and Goldwater v. Carter, 444 U.S. 996, 100 S.Ct. 533 (1979). Gauged in accordance to the three criteria for determining whether a question is political as set forth in Goldwater, the question here is not political but one which is judicial. Thus, both Ferguson and Stahl are in conflict with decisions of this Court.

The issue of whether Section 205 of the Revised Statutes is unconstitutional on separation of powers grounds was raised but not decided in the court

below. The very recent case of Bowsher v. Synar, 54 Law Week 5064 (U.S. S.Ct., July 7, 1986), held that legislative officials could not exercise executive department powers. In the instant case, the question presented concerns the exercise of legislative powers by an official in the executive branch. With the recent decision in Bowsher, a decision on the same issue as presented in Bowsher from the viewpoint of the executive branch is essential to fully develop the separation of powers doctrine.

For the reason that this case presents the unsettling question concerning the ratification of an important amendment to the U.S. Constitution, as well as an important corollary to the separation of powers doctrine, this Court should grant the writ sought herein.

ARGUMENT

I. State courts consider challenges to the adoption of amendments to state constitutions as presenting a judicial question.

Examples of state courts which consider the question of amending state constitutions, and controversies arising therefrom, as judicial questions, are numerous. Perhaps one of the first challenges made on this ground occurred in Collier v. Frierson, 24 Ala. 100 (1854). Here, the Alabama Supreme Court held that the state constitution must be followed when it is being amended, and if an amendment is not enacted in accordance with the law, the amendment will not be considered as a part of the constitution; see also Alabama v. Manley, 441 So.2d 864 (Ala., 1983). The Arkansas Supreme Court also considers this issue as a judicial

one; see Rice v. Palmer, 78 Ark. 432, 96 S.W. 396 (1906). And the same applies in California; see Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 P. 3 (1886).

In Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963 (1912), the Florida Supreme Court enjoined the publication of a proposed amendment to the state constitution. In Hammond v. Clark, 136 Ga. 313, 71 S.E. 479 (1911), the Georgia Supreme Court held that the Governor's proclamation that an amendment was adopted was not conclusive upon the courts. In McBee v. Brady, 51 Idaho 761, 100 P. 97 (1909), the court struck an amendment apparently adopted, as also occurred In re Denny, 156 Ind. 104, 59 N.E. 359 (1901).

In Koehler v. Hill, 60 Iowa 543, 14 N.E. 738, reh. den., 15 N.W. 609 (1883), a situation similar to the one presented herein occurred. The Iowa Constitution

at the time required a proposed amendment to be adopted by two separate sessions of the legislature. One session adopted a proposed amendment, but the succeeding session adopted one which was minutely different. Notwithstanding a popular vote in favor of the amendment, the Iowa Supreme Court struck the amendment due to the fact that the two sessions of the legislature had not concurred in the same precise amendment.

Perhaps one of the best cases dealing with this particular subject and the duty of the court to strike an amendment which was improperly adopted is Graham v. Jones, 198 La. 507, 3 So.2d 761 (1941), which voided an amendment which was improperly enacted. In doing so, the court held that its action in voiding an improperly adopted amendment would not itself harm the government. If the gov-

ernment was so harmed, it would be the fault of the legislature.

There are many other cases in the same and other states wherein the courts have examined, as a judicial question, the enactment of amendments to state constitutions. Some of the additional cases include Loring v. Young, 239 Mass. 349, 132 N.E. 65 (1921); State v. Powell, 77 Miss. 543, 27 So. 927 (1900); Durfee v. Harper, 22 Mon. 354, 56 P. 582 (1899); State v. Babcock, 17 Neb. 188, 22 N.W. 372 (1885); State v. Davis, 20 Nev. 220, 19 P. 894 (1888); State v. Foraker, 46 Ohio St. 677, 23 N.E. 491 (1890); State v. State Board of Equalization, 107 Okl. 118, 230 P. 743 (1924); Kadderly v. Portland, 44 Ore. 118, 74 P. 710 (1903); Lovett v. Ferguson, 10 S.D. 44, 71 N.W. 765 (1897); Cudihee v. Phelps, 76 Wash. 314, 136 P. 367 (1913); and State v. Marcus,

160 Wis. 354, 152 N.W. 419 (1915). Clearly, these state courts have found that they have the constitutional power to review questions concerning the enactment of amendments and they have found that such questions are judicially manageable.

II. The principle of legislative concurrence requires all legislative bodies involved in the enactment of legislation to agree upon the same, precise, identical piece of legislation.

One of the best examples of this principle is the case of Moog v. Randolph, 77 Ala. 597 (1884). In this case, the Alabama legislature had passed a certain bill, but the bill presented to and signed by the Governor did not contain a phrase which was inserted into that same bill by amendment. In striking the entire purported law, the Alabama Supreme

Court stated:

> "Let us suppose, for illustration, that the bill in its complete form, as it passed the two houses, had been signed by the presiding officers of these respective bodies, and had been presented to the Governor for his approval, and he had drawn his pen through this same amendment, and, after thus expunging it, had approved the residue of the measure, this being done as a condition precedent to affixing his signature. Would there not exist, in such a case, precisely the same difference in fact between the bill passed and that approved, as is here presented? The part expunged in the one case, and the part omitted in the other, being identical, the identity of the remainder is axiomatic. Could anyone seriously contend, that the approval of a part of a measure, however honestly done in the conviction of its propriety, would operate to give any legal force to the part thus approved? And yet, where is the difference, in practical effect, between the two cases? The clear logic of the case lies in the axiom, that a bill is an entirety, and a law is the product of the combined, harmonious and unanimous action of the legislative and executive departments of government, each acting strictly within the scope of its constitutional authority, and according to the prescribed forms of the constitutional mandate." 77 Ala. at 600.

It has been a frequent enough occur-

rence for legislative bodies to fail to concur with each other on a given piece of legislation that a substantial body of case law exists to demonstrate this principle. In Rogers v. State, 72 Ark. 565, 82 S.W. 169 (1904), the Arkansas House adopted a bill which minutely varied from a similar bill adopted by the Arkansas Senate; the court found that there was no law. In State v. Skaley, 108 Fla. 506, 146 So. 544 (1933), the Florida Senate adopted a bill which used the word, "podiatry", while the House adopted a bill which used the word, "pediatry". The court held that there was no law. Other cases include Hillsborough County v. Temple Terrace Assets Co., 111 Fla. 368, 149 So. 493 (1933) and State v. City of Sanford, 113 Fla. 750, 152 So. 193 (1934).

This principle applies in Illinois as

demonstrated by the case of People v. Lueders, 283 Ill. 287, 119 N.E. 339 (1918), as do the cases of State v. Laiche, 105 La. 84, 29 So. 700 (1901), County Commissioners of Washington County v. Baker, 141 Md. 623, 119 A. 461 (1922), and Carnegie Institute of Medical Laboratory Technique, Inc. v. Approving Authority For Schools For Training Medical Laboratory Technologists, 213 N.E. 2d 225 (Mass. 1965), for the States of Louisiana, Maryland and Massachusetts.

The same rule applies in Michigan and Nebraska; see Rode v. Phelps, 80 Mich. 598, 45 N.W. 493 (1890), State v. McClelland, 18 Neb. 236, 25 N.W. 77 (1885), and Moore v. Neece, 80 Neb. 600, 114 N.W. 767 (1908). The cases of In re Jaegle, 83 N.J.L. 313, 85 A. 214 (1912), and In re Kornbluh, 134 N.J.L. 529, 49 A.2d 255 (1946), show that the courts in New Jer-

sey follow this rule.

This principle also has application in other states; it applies in Oregon as demonstrated by Oregon Business and Tax Research, Inc. v. Farrell, 176 Ore. 532, 159 P. 2d 822 (1945). And courts in Tennessee, Wisconsin and Wyoming strike laws where it is shown there is no concurrence between the bodies involved in the enactment of legislation; see Fugua v. Davidson County, 189 Tenn. 645, 227 S.W.2d 12 (1950), State v. Wendler, 94 Wis. 369, 68 N.W. 759 (1896), and State v. Swan, 7 Wy. 166, 51 P. 209 (1897).

The principle of concurrence applies to legislation at the federal level and both houses of Congress must completely agree upon any given bill before it may become a law. Further, when Congress proposes a constitutional amendment and submits the same to the states for rati-

fication, the states must adopt precisely what Congress so proposed. If any state changes or amends the amendment proposed by Congress, it cannot be considered as a state which ratified the amendment.

III. The question of whether or not an amendment to the U.S. Constitution was adopted is a judicial question, especially when fraud in the ratification of that amendment is alleged and proven.

Almost from the very beginning of this nation after the American Revolution, this Court has considered the performance of ministerial tasks by public officials as reviewable by this Court. In Marbury v. Madison, 5 U.S. (1 Cranch) (1803), Secretary of State James Madison refused to perform the ministerial task of granting Marbury a Justice of the Peace Commission. Here, the Court reviewed Madison's action and compelled his perform-

ance. This case commenced a long line of cases wherein the performance of ministerial acts of public servants was revieved; see Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838); Butterworth v. Hoe, 112 U.S. 50, 5 S.Ct. 25 (1884); United States v. Schurz, 102 U.S. 378 (1880); Nobel v. Union River Logging R. Co., 147 U.S. 165, 13 S.Ct. 271 (1893); and American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 23 S.Ct. 33 (1902).

In reference to the performance of discretionary acts by public officials, the Court in the past refused to engage in such review; see Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1886). However, today, with the Administrative Procedure Act, 5 U.S.C., Section 702, this Court will review the performance of discretionary; see Kent v. Dulles, 357

U.S. 116, 78 S.Ct. 1113 (1958).

When the question concerning whether or not a law existed was first presented to this Court, it held that such a question was a judicial one; see Gardner v. Collector, 73 U.S. (6 Wall.) 499 (1868), and Town of South Ottowa v. Perkins, 94 U.S. 260 (1877). But later, when a challenge was made that an enrolled bill in the possession of the Secretary of State was not the bill actually passed by Congress, this Court, in Field v. Clark, 143 U.S. 649, 12 S.Ct. 495 (1892), held that it would follow the "enrolled bill rule"; this meant that such enrolled acts which were signed by the President of the Senate, Speaker of the House, and the President of the United States were considered to be the valid laws passed by Congress. But, no sooner than when the decision was rendered in this case, this Court made an

exception to this rule and permitted a review of the vote in both houses of Congress to determine whether a bill was adopted by a quorum of each house; see United States v. Ballin, 144 U.S. 1, 12 S.Ct. 507 (1892), which was decided the same day as Field. And later, when the Eighteenth Amendment's ratification was challenged, this Court again looked to the vote in each house of Congress to see if the constitutional quorum for the proposal of an amendment was met; see Rhode Island v. Palmer (The National Prohibition Cases), 253 U.S. 350, 40 S.Ct. 486 (1920).

Article V of the U.S. Constitution deals with the enactment of amendments to the U.S. Constitution. This Article provides that Congress may propose amendments and then submit the same to the state legislatures for ratification.

Whenever three fourths of such state legislatures shall ratify the amendment, the same shall become a part of the Constitution. This Article is completely silent as to how it shall be determined that an amendment was so adopted: such decision is not committed to either the executive or legislative branches of the national government. Can any branch assert the right that it, and it alone, can make a determination as to whether an amendment has been adopted? True, the legislative or executive branch can declare, as can any American citizen, that an amendment was or was not ratified, but such is not binding upon the nation as a whole. The Constitution declares that an amendment is a part of it "when ratified". Ratification of an amendment is an event which is provable by evidence and argument. And the only place in our

nation where evidence and argument are presented to prove or disprove the happening of an event, including fraud, is in the judiciary.

One case dealing with the Eighteenth Amendment concerned when that amendment became effective. In Dillon v. Gloss, 256 U.S. 368, 41 S.Ct. 510 (1921), the issue concerned a crime committed between the time that the Eighteenth Amendment was ratified and its certification by the Secretary of State. This Court held that an amendment became a part of the Constitution "when ratified" by the states; it also held that the Secretary, when proclaiming the adoption of an amendment, was performing a ministerial act. Thus, the decision in Dillon clearly shows that the performance of the Secretary of State when he proclaims the adoption of an amendment is reviewable, since his act

was held to be a ministerial act which has always been subject to review. And, since the Court held that an amendment is effective "when ratified", it left open the question of whether and when an amendment has been so ratified.

A year later, this Court was faced with another question regarding the ratification of the Nineteenth Amendment. In Leser v. Garnett, 258 U.S. 130, 42 S.Ct. 217 (1922), this Court held that the proclamation of the Secretary of the adoption of an amendment is conclusive upon the Courts. However, this opinion must be read in the light of the well established legal maxim that the courts will review the performance of ministerial acts, and thus the Secretary's act of proclamation, being ministerial, is reviewable in a proper case. Leser, therefore, stands for the proposition that if

an amendment has really and truly been ratified, the proclamation of the Secretary is sufficient. But, if the amendment was not really and truly ratified, and if the Secretary committed an unlawful or fraudulent act by proclaiming ratification, then the adoption of the amendment must be open to examination by the Court.

Thus, the question involved in The Wrights' case is dependent upon the proper construction of both Dillon and Leger. The later case has only a limited application; if the amendment really is adopted, then the Secretary's proclamation is effective. But, if the Secretary's performance of his ministerial act of proclaiming the ratification of an amendment is challenged, then the question presented is a judicial one plainly revievable in the courts.

IV. Section 205 of the Revised Statute is unconstitutional as an unlawful delegation of legislative power to an executive official and is further unconstitutional on separation of powers grounds.

The act of proclaiming the passage or adoption of legislation is a legislative power, and Congress cannot delegate a legislative power to anyone as such power is vested in Congress and Congress alone by the Constitution; see Field v. Clark, 143 U.S. 649, 12 S.Ct. 495 (1892). All Congressional legislation must have an enacting clause and effective date and Congress alone can determine the effective date. This power of determining the effective date cannot be delegated as is the case with any other legislative power of Congress; see Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241 (1935); Schecter Poultry Corp. v. United States,

295 U.S. 495, 55 S.Ct. 837 (1935); and Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855 (1936).

Determining when or if an amendment to the constitution has been ratified is a legislative power. But, Section 205 of the Revised Statutes conferred upon the Secretary of State this vital legislative power, and, as such, this section is unconstitutional.

The further defect of Section 205 is the commingling of legislative and executive powers. Assuming, for argument purposes, that the entire process of the ratification of an amendment is vested solely in the hands of Congress, then only Congress can proclaim the ratification of an amendment. But, without this assumption, like the Congressional determination of the effective date of ordinary legislation, only Congress can de-

clare the effective date of an amendment. However, Section 205 permitted an executive branch official, the Secretary of State, to determine if and when an amendment was ratified, and he was thus empowered to determine the effective date of an amendment.

In Bowsher v. Synar, 54 Law Week 5064 (U.S. S.Ct. July 7, 1986), this Court demonstrated the continued vitality of the separation of powers doctrine. This Court held in Bowsher that a legislative officer could not exercise executive department powers. A necessary corollary to this proposition is that executive officers cannot exercise legislative powers. Review of Section 205 and analysis of the powers conferred by this law to the Secretary of State plainly shows that he, as an executive official, was exercising legislative powers. Such

being the case, Section 205 is unconstitutional.

CONCLUSION

In July, 1909, Congress proposed the Sixteenth Amendment to the states for ratification. This carefully worded amendment composed of 30 precise words attempted to confer an extremely important power of taxation upon Congress, one permitting the imposition of a direct tax without being subject to apportionment. However, as noted previously, this amendment was not adopted by thirty six (36) states.

Knox knew of the problems concerning the ratification of the Sixteenth Amendment. Notwithstanding knowledge of the above, Knox, an executive branch official exercising legislative powers pursuant to Section 205 of the Revised Statute,

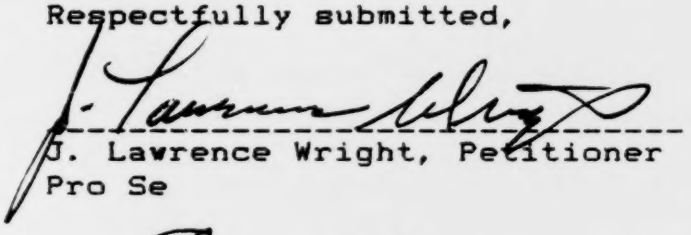
proceeded, on February 25, 1913, to proclaim that thirty eight (38) states had ratified the Sixteenth Amendment. The truth is that less than thirty six (36) states, three fourths of the states then in the Union, ratified this proposed amendment. But Knox, a lawyer, former U.S. Attorney General, former Senator from the State of Pennsylvania, and at that time, Secretary of State, undertook to commit a fraudulent and unlawful act by proclaiming ratification of the challenged amendment. This act was performed under the alleged authority of an unconstitutional statute and Knox's proclamation, therefore, cannot be conclusive upon the courts.

The United States Supreme Court, the final authority in this nation on matters of law, and guardian of the liberties of the American people, should review this

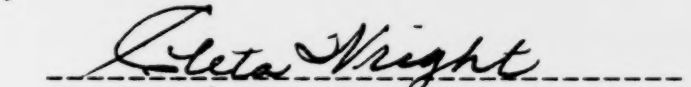
matter of an amendment which presently exists against the peace and dignity of this nation. The Petition For Writ of Certiorari must therefore be granted.

DATE: February 6, 1987

Respectfully submitted,



J. Lawrence Wright, Petitioner
Pro Se

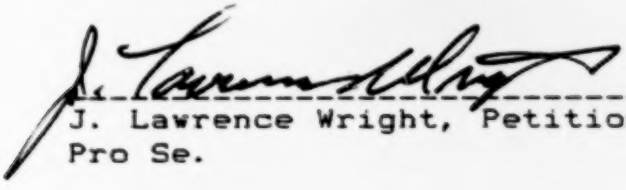


Cleta Wright, Petitioner
Pro Se

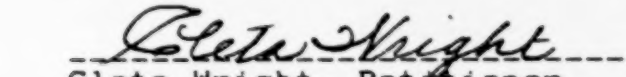
DECLARATION

We, J. Lawrence Wright and Cleta Wright, declare that we are the Petitioners in the foregoing action, that we have read the contents thereof, that they are true to the best of our knowledge except those allegations based on information and belief, and as to those, we believe them to be true.

DATED: February 6, 1987.



J. Lawrence Wright, Petitioner
Pro Se.



Cleta Wright, Petitioner
Pro Se.

AFFIDAVIT OF SERVICE
S. CT. RULE 28.5 (c)

It is HEREBY CERTIFIED that service of the foregoing:

PETITION FOR WRIT OF CERTIORARI,

Has this _____ Day of ~~December 1986~~ February 1987, been made upon the parties to the proceeding, by depositing three copies in the United States Mail, Postage prepaid at _____, California, addressed to:

Solicitor General
United States Department of Justice
Washington, D.C. 20530

Roger M. Olsen
Acting Assistant Attorney General

William L. Paup
William S. Estabrook
Martha B. Brissette
Attorneys, Tax Division
P.O. Box 502
Washington, D.C. 20044

I am not a member of the Bar of this Court, nor a party to this action. I am a resident of the City of _____,

California, and have served the parties as so listed above, by the above description of service by mail, on behalf of the Petitioners to this action, J. Lawrence Wright and Cleta Wright, in Pro Se.

I, the undersigned, a Notary Public, in and for the State of California, County of _____, this _____ day of _____, ~~1986~~ 1987, witness this day that the one known to me to be the above signatory personally appeared before me this day and subscribed his/her signature to the foregoing.

My Commission expires: _____

APPENDIX A

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JANE R. FERGUSON,
Defendant-Appellant.

No. 85-1688.

United States Court of Appeals
Seventh Circuit.

Argued Dec. 3, 1985.

Decided June 12, 1986.

Defendant/taxpayer was convicted on three counts of failure to file tax return, two counts of supplying false and fraudulent statements claiming to be exempt from federal income taxes, and three counts of making false claims for income tax refunds in the United States District Court for the Southern District of Indiana, Indianapolis Division, 615 F. Supp. 8, James E. Noland, Chief Judge. Defendant appealed. The Court of

Appeals, Grant, Senior District Judge, sitting by designation, held that: (1) Government established taxpayer's willfulness as to counts of failing to file tax return and supplying false and fraudulent statements claiming to be exempt from federal income taxes, in that Government introduced evidence which established taxpayer's knowledge of her duty to file proper returns and forms, taxpayer's "Affidavits of Revocation" stated that she was not required to file forms or pay taxes, thus showing her intent to violate her duty to file, and taxpayer's letter stated that income was not wages and she would continue to file exempt W-4 forms, and (2) because taxpayer's characterization of tax collected in 1980 and 1981 as "excise tax" which was not owed was patently false and utterly groundless, taxpayer

violated statute prohibiting making false claims for income tax refunds.

Affirmed.

1. Internal Revenue 5250

Government need not show bad faith on part of defendant under tax crimes statutes. 26 U.S.C.A. Sections 7203, 7205.

2. Internal Revenue 5294

Government may show willfulness in violation of tax crime statutes by presenting defendant's properly filed income tax returns or W-4 forms from prior years. 26 U.S.C.A. Sections 7203, 7205.

3. Internal Revenue 5300

Government established taxpayer's willfulness as to counts of failing to file tax return and supplying false and fraudulent statements claiming to be exempt from federal income taxes, in that

Government introduced evidence which established taxpayer's knowledge of her duty to file proper returns and forms, taxpayer's "Affidavits of Revocation" stated that she was not required to file forms or pay taxes, thus showing her intent to violate her duty to file, and taxpayer's letter stated that income was not wages and she would continue to file exempt W-4 forms. 26 U.S.C.A. Sections 7203, 7205.

4. Internal Revenue 5205

In order to prove violation of making false claims for income tax refunds, Government need not prove that defendant acted "willfully". 18 U.S.C.A. Section 287.

5. Internal Revenue 5250

Because taxpayer's characterization of tax collected in 1980 and 1981 as "excise tax" which was not owed was patently

false and utterly groundless, taxpayer violated statute prohibiting making false claims for income tax refunds. 18 U.S.C.A. Section 287.

6. Constitutional Law 10

Sixteenth Amendment to Constitution was not improperly ratified. U.S.C.A. Const. Amend. 16.

Lowell H. Becraft, Jr., Huntsville, Ala., for defendant-appellant.

Roger L. Duncan, Asst. U.S. Atty., John D. Tinder, U.S. Atty., Indianapolis, Ind., for plaintiff-appellee.

Before: EASTERBROOK, Circuit Judge, ESCHBACH, Senior Circuit Judge, and GRANT, Senior District Judge.*

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*The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

GRANT, Senior District Judge.

Defendant-appellant challenges her conviction, after a bench trial, on three counts of failure to file a tax return in violation of 26 U.S.C. Section 7203, on two counts of supplying false and fraudulent statements claiming to be exempt from federal income taxes in violation of 26 U.S.C. Section 7205(a), and on three counts of making false claims for income tax refunds in violation of 18 U.S.C. Section 287. Defendant-appellant received one year's imprisonment for one of the false claim for refund counts and a fine of $5,000. The district court, 615 F. Supp. 8, suspended sentencing on the remaining false claim for refund counts and placed defendant-appellant on probation for five years. Defendant-appellant received a sentence of one year's

imprisonment on each of the failure to file counts to run concurrently with the other one year's sentence. The district court also ordered defendant-appellant to pay all federal and state taxes due and owing.

On appeal, defendant-appellant contends that she did not act willfully when violating the Internal Revenue Code, and that she did not know her refund claims were false. She also asserts that the Government may not legally tax income because the sixteenth amendment was never properly ratified. We affirm her conviction.

Facts

Defendant-appellant, Ferguson, and Charles M. Ferguson filed joint income tax returns for the years 1977, 1978 and 1979. During 1980, 1981 and 1982, Ferguson worked for the Delco-Remy

Division of General Motors Corporation and received taxable income. In each of those years, her employer withheld for federal income tax purposes a portion of the total tax owed to the Internal Revenue Service [hereinafter referred to as IRS]. Because Ferguson failed to file income tax returns for 1980, 1981 and 1982, she never paid the tax owed above the amount which was withheld.

In lieu of the returns she ought to have filed, Ferguson sent the IRS Affidavits of Revocation. Each Affidavit stated that she had mistakenly submitted herself to the jurisdiction of the IRS and that, after extensive research and consultation with counsel, she had found that she was not required to pay tax or file returns. The documents also denied that the IRS or any governmental agency had jurisdiction over her with respect to

the filing or payment of taxes. The documents concluded that Ferguson was not and is not required to file returns or pay taxes.

On January 8, 1981, the IRS received a "Eugene J. May" copyrighted 1040X form

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1. Privately printed and distributed, the "Eugene J. May" form closely resembles official IRS forms. "Eugene J. May" forms, however, contain margin and line captions differing from those found on standard IRS forms. In general these changes reflect May's groundless assertion that "money received as a result of labor is not income within the meaning of the Sixteenth Amendment to the United States Constitution or the Internal Revenue Code." United States v. May, 555 F.Supp. 1008, 1009 (E.D. Mich. 1983). Such forms have become a familiar phenomenon in tax protestor cases. See Weller v. Commissioner, 1985 Tax Ct. Mem. Dec. (P-H) Paragraph 85,387 (Aug. 5, 1985); see also Unroe v. Commissioner, 1985 Tax Ct. Mem. Dec. (P-H) Paragraph 85,149 (Mar. 27, 1985); Franklin v. Commissioner, [1984] 53 Tax Ct. Mem. Dec. (P-H) Paragraph 84,287 (May 24, 1984). The IRS was granted an injunction enjoining May from distributing forms which differ in any respect from the official 1040 form. May, 555 F.Supp. 1008.

from Ferguson. A 1040X form is an Amended United States Individual Income Tax Return. In sum, the "Eugene J. May" 1040X form stated that wages are not income and it sought a refund for taxes paid by Ferguson in 1979 in the amount of $10,165. Ferguson also sought refunds of the taxes withheld by Delco-Remy in 1980 and 1981 by filing IRS forms 843. On these forms, she stated that the amount of tax collected in the corresponding years "was collected illegally/ erroneously as an income tax. Said tax is an excise tax and is not owed to the Internal Revenue Service." Form 843, Government Exhibits 7 and 8.

In 1980, 1981, 1982 and 1983, Ferguson filed W-4 forms, Employee's Withholding Allowance Certificates, which stated that she was exempt from taxes. In December 1982, Ferguson wrote the

IRS to clarify their "misunderstanding" about her exempt status. The letter contended that the income tax is voluntary and that wages are not income. The letter stressed that Ferguson would no longer consider the Internal Revenue Code legal because it was not properly enacted.

I.

[1-3] 26 U.S.C. Sections 7203 and 7205 required that a defendant act willfully when violating their provisions. "'Willful in the tax crime statutes means a voluntary, intentional violation of a known legal duty....'" United States v. Green, 757 F.2d 116, 123 (7th Cir. 1985) (quoting United States v. Pomponio, 429 U.S. 10, 13, 97 S.Ct. 22, 24, 50 L.Ed.2d 12 (1976)); see United States v. Quilty, 541 F.2d 172, 176 (7th Cir.1976). The Government need not show bad faith on the

part of a defendant under the tax crime statutes. Green, 757 F.2d at 123. The Government may show willfulness by presenting a defendant's properly filed income tax returns or W-4 forms from prior years. United States v. Scrlin, 707 F.2d 953, 959 (7th Cir. 1983); United States v. Moore, 627 F.2d 830, 832 (7th Cir. 1980), cert. denied, 450 U.S. 916, 101 S.Ct. 1360, 67 L.Ed.2d 342 (1981). In the instant case, the Government introduced such evidence and it establishes Ferguson's knowledge of her duty to file proper income tax returns and W-4 forms. Ferguson's Affidavits of Revocation stated that Ferguson is not required to file income tax forms or to pay taxes. This shows her intent to violate her duty to file. Ferguson's December 1982 letter to the IRS stated that income is not wages and that she

would continue to file exempt W-4 forms. This shows her intent to file the false and fraudulent withholding forms. We conclude that the Government established Ferguson's willfulness.

II.

[4] Under 18 U.S.C. Section 287, the Government must prove that a defendant made a claim upon the United States knowing that the claim was false. The Government need not prove that the defendant acted "willfully". United States v. Blecker, 657 F.2d 629, 634 (4th Cir. 1981) (Section 287 does not require a showing of specific intent to defraud the government), cert. denied, 454 U.S. 1150, 102 S.Ct. 1016, 71 L.Ed.2d 304 (1982); United States v. Irwin, 654 F.2d 671, 680-82 (10th Cir. 1981), cert. denied, 455 U.S. 1016, 102 S.Ct. 1709, 72 L.Ed.2d 133 (1982).

[5] Ferguson filed a "Eugene J. May" 1040X form seeking a refund of the taxes she paid in 1979 and submitted form 843 claims for refunds for taxes withheld by her employer during 1980 and 1981. These forms on their faces demonstrate Ferguson's knowledge of the falsity of her claims. First, the "Eugene J. May" form reflects the filer's efforts to gain a refund through her groundless interpretation of the tax laws. See discussion, supra, note 1. Second, the claims on form 843 state that the tax collected in 1980 and 1981 was an excise tax which was not owed. During the years in question, the law did not require Ferguson to pay an excise tax. The taxes levied upon Ferguson during 1980 and 1981 was an excise tax which was not owed. During the years in question, the law did not require Ferguson to pay an excise

tax. The taxes levied upon Ferguson during 1980 and 1981 clearly constituted an income tax authorized by the sixteenth amendment to the constitution. Because her characterization was patently false and utterly groundless, she violated 18 U.S.C. Section 287.

III.

[6] Ferguson invites our review of the validity of the ratification of the sixteenth amendment. Two recent panels of this Court have considered the arguments and evidence presented by Ferguson in the instant appeal. See United States v. Thomas, 788 F.2d 1250, 1253 (7th Cir. 1986); United States v. Foster, 789 F.2d 457, 461-63 (7th Cir. 1986). Because those two opinions analyze Ferguson's present claim and find it to be lacking, we, for the reasons stated in Thomas and Foster, reject

Ferguson's contention that the amendment was improperly ratified.

Conclusion

This Court AFFIRMS Ferguson's conviction.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 85-3069 D.C. No. CR 85-BLG
v.	OPINION
LELAND G. STAHL, Defendant-Appellant.	

Appeal from the
United States District Court
for the District of Montana
W.B. Enright,
District Judge, Presiding
Argued and Submitted February 12, 1986
Seattle, Washington

Before: WALLACE and THOMPSON,
Circuit Judges, and
STEPHENS, Senior District Judge*

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* Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

THOMPSON, Circuit Judge:

Leland G. Stahl appeals from his jury trial conviction on one count of making a false statement on his income tax return, and of three counts of failing to file income tax returns, in violation of 26 U.S.C. Sections 7206(1) and 7203. Stahl contends that the district court erred by denying his pretrial motion to dismiss the indictment. Stahl based his motion to dismiss on the ground that the sixteenth amendment to the United States Constitution was never properly ratified, fraud was committed in the ratification process, and the amendment is therefore void. We reject Stahl's contentions and affirm.

Stahl argues that the sixteenth amendment was never ratified by the requisite number of states because of clerical errors in the ratifying

resolutions of the various state legislatures and other errors in the ratification process.[1/] He further argues that Secretary of State Knox committed fraud by certifying the adoption of the amendment despite these alleged errors. Secretary of State Knox

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1/ Stahl directs the court's attention to the certified copies of the resolutions passed by the legislatures of the several states that ratified the sixteenth amendment. Only four of these resolutions quoted the language of the amendment with absolute accuracy. Thirty-three resolutions contained punctuation, capitalization, or wording errors. Minnesota did not send a copy of the resolution passed by its legislature to the Secretary of State. The secretary of the Governor merely informed the State Department that the legislature had ratified the proposed amendment. Stahl alleges that Kentucky's legislature never passed the proposed amendment. Stahl also alleges discrepancies in the resolution signatures of South Dakota and Washington, and other procedural errors for California (no record of the vote in either house), Ohio (not a state at the time), North Dakota (ratification in the form of a bill, not a resolution), Arkansas (ratification occurred after previous rejection), and Arizona.

certified that the sixteenth amendment had been ratified by the legislatures of thirty-eight states, two more than the thirty-six then required for ratification. His certification of the adoption of the amendment was made pursuant to Section 205 of the Revised Statutes of the United States which provided:

> Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

Act of April 20, 1818, ch. 80, Section 2, Rev. Stat. Section 205 (2d ed. 1878) (amended version codified at 5 U.S.C. Section 160 (1940) (repealed Oct. 31,

1951); current version, as amended, at 1 U.S.C. Section 106b (Supp. II 1984)).

Secretary of State Knox's certification of the adoption of the sixteenth amendment is conclusive upon the courts. United States v. Thomas, 788 F.2d 1250, 1253-54 (7th Cir. 1986); see also Leser v. Garnett, 258 U.S. 130. 137 (1921). In Leser suit was brought to strike the names of two women from the list of qualified voters in Maryland on the ground that the constitution of Maryland limited suffrage to men. Maryland had refused to ratify the Nineteenth Amendment. The necessary minimum of thirty-six states had ratified the amendment. The Secretary of State of the United States had certified its adoption. It was contended, however, that the ratifying resolutions of Tennessee and West Virginia, two of the

states that had ratified the amendment, were inoperative because the resolutions of those states had been adopted in violation of their rules of legislative procedure. In answer to that contention the Court rules:

> The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six States, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States." As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.
>
> Id. at 137.

Stahl attempts to distinguish Leser on the ground that Leser did not involve a claim of fraud in the ratification process. If Stahl's challenge to the validity of the ratification process of

the sixteenth amendment is a nonjusticiable, political question, however, that contention is irrelevant.

In Baker v. Carr, 369 U.S. 186 (1962), the Court set out a list of "formulations" which may identify the existence of a political question in a given case:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision

> already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

Stahl's claim that ratification of the sixteenth amendment was fraudulently certified constitutes a political question because we could not undertake independent resolution of this issue "without expressing lack of the respect due coordinate branches of government." Id. In Field v. Clark, 143 U.S. 649 (1892), the Court encountered a claim that a bill had not in fact been passed by Congress. The Court held that when a bill has been signed by the Speaker of the House and by the President of the Senate and has received the President's approval, "its authentication as a bill that has passed Congress should be deemed complete and unimpeachable.... The respect due to coequal and independent

departments requires the judicial department... to accept, as having passed Congress, all bills authenticated in the manner states." Id. at 672. Significantly, the Court noted the possibility that the Speaker of the House and the President of the Senate could fraudulently impose a bill that was never passed by Congress. But [j]udicial action based upon such a.... suggestion is forbidden by the respect due to a coordinate branch of the government." Id. at 673.

In Leser, the Court, confronting the claim that ratifying resolutions of two states were inoperative, extended the rule declared in Field to the Secretary of State's authentication that a constitutional amendment had been duly ratified. 258 U.S. at 137. Baker indicates that the application of the

political question doctrine in Leser was demanded by the respect due coordinate branches. Baker, 369 U.S. at 214.

Stahl's claim falls plainly within the confines of Leser and Field. Stahl's claim rests on an assertion that the ratifying resolutions of many states were inoperative. Since the Secretary of State proclaimed that the sixteenth amendment had been duly ratified, this assertion presents a political question under Leser. Stahl's suggestion of fraud on the part of the Secretary does not render the question justiciable, for "[j]udicial action based upon such a suggestion is forbidden by the respect due to a coordinate branch of the government." Field, 143 U.S. at 673. Moreover, in Baker, the Court in discussing judicial review of the ratification process characterized the

political question doctrine as "a tool for maintenance of governmental order." Baker, 369 U.S. at 215. Consideration of Stahl's contention, 73 years after certification of the amendment's adoption and after countless judicial applications, would promote only disorder. See United States v. Foster, 789 F.2d 457, 462-63 (7th Cir. 1986).

We conclude that the Secretary of State's certification under authority of Congress that the sixteenth amendment has been ratified by the requisite number of states and has become part of the constitution is conclusive upon the courts.[2/]

AFFIRMED.

2/ Stahl relies on two district court cases, Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (three-judge court), and Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), vacated as moot mem., 459 U.S. 809 (1982), for the proposition that the matters he seeks to adjudicate are not barred by the political question doctrine. Neither case is binding on this court, nor do we find them persuasive under the facts of this case.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. LAWRENCE AND CLETA WRIGHT,	)	
	)	No. 85-7551
Petitioners-Appellants,	)	T.C. No. 27193-83
v.	)	
	)	**MEMORANDUM***
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	
Respondent-Appellee.	)	

Appeal from a Decision

of the United States Tax Court

Submitted July 22, 1986**

Before: POOLE, NORRIS, AND REINHARDT, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 3 (f).

J. Lawrence and Cleta Wright appeal the Tax Court's order dismissing for lack of proper prosecution their petition for redetermination and determining the extent of deficiency in their tax payments for 1980 and 1981. We have jurisdiction in this matter pursuant to 26 U.S.C. Section 7482, and we affirm.

Facts

The Wrights petitioned the Tax Court for redetermination of their tax liability for 1980 and 1981, then filed a demand for an evidentiary hearing by which to show that the IRS lacked jurisdiction. During trial, the Tax Court granted the government's motion to dismiss the petition for failure to prosecute when the Wrights refused further to participate. It subsequently entered an order assessing the Wrights for tax payment deficiencies for 1980 and

1981, negligence penalties under U.S.C. Section 6653(a), and damages under 26 U.S.C. Section 6673 for bringing a frivolous petition. The Wrights timely appeal.

Analysis

I. Tax Court Jurisdiction

Whether the Tax Court lacked subject matter jurisdiction is a question of law that this court reviews de novo. See Mayors v. Commissioner, 785 F.2d 757, 759 (9th Cir. 1986), Clayton v. Republic Airlines, Inc, 716 F.2d 729, 730 (9th Cir. 1983).

The Wrights argue that the Tax Court lacked subject matter jurisdiction over their petition because the sixteenth amendment was never properly ratified, there being technical variations between the amendment as devised by congress and the amendment as passed upon by the

various state legislatures. This contention is meritless. An identical challenge to the validity of the sixteenth amendment was recently rejected by this court. United States v. Stahl, 792 F.2d 1438 (9th Cir. 1986). We held that the Secretary of State's certification that the sixteenth amendment was properly ratified is "conclusive upon the courts." Stahl, 792 F.2d at 1439. Thus the Tax Court had subject matter jurisdiction over the Wrights' petition.

II. Sanctions

The government seeks sanctions against the Wrights for bringing a frivolous appeal. An appeal is frivolous when the result is obvious or the arguments on appeal are entirely without merit. DeWitt v. Western Pacific Railroad Co., 719 F.2d 1448, 1451 (9th Cir. 1983).

This court has discretion to impose single or double costs and attorney fees as sanctions for bringing a frivolous appeal. Olson v. United States, 760 F.2d 1003, 1005 (9th Cir. 1985) (per curiam), Fed. R. App. P. 38, 28 U.S.C. Section 1912.

The Wrights' appeal is not frivolous because it was taken before this court's decision in Stahl. When, during the pendency of one appeal, this court in a separate case gives serious and detailed consideration to the same legal issue and arguments, it cannot be said that the result in the pending appeal is obvious or that the arguments wholly lack merit. Cf. Kalgarrd v. Commissioner, 764 F.2d 1322, 1324 (9th Cir. 1985) (sanctions appropriate where appellant's attorney was on notice of the law governing the case and the lack of merit in the

appeal). This court gave serious consideration in Stahl to the same sixteenth amendment invalidity argument raised here, and because Stahl was decided after the Wrights had filed and briefed this appeal, their appeal was not frivolous. The sanctions requested by the government under 28 U.S.C. Section 1912 are therefore denied.

The judgment of the Tax Court is

AFFIRMED.

FILED Sept. 22, 1986

IN THE UNITED STATES
COURT OF APPEALS
FOR THE
NINTH CIRCUIT

UNITED STATES OF AMERICA

Respondent - Appellee

vs

J. LAWERENCE WRIGHT

and

CLETA WRIGHT

Petitioners - Appellants

On Appeal From The United
States Tax Court

APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

J. LAWERENCE WRIGHT and CLETA WRIGHT
Petitioners - Appellants
P.O. Box 2323
Grass Valley, CA 95945

CERTIFICATE OF INTERESTED PERSONS

Case No. 85-7551

UNITED STATES OF AMERICA,

Respondent - Appellee

vs.

J. LAWERENCE WRIGHT and CLETA WRIGHT

Petitioners - Appellants

Certification Required by Ninth Circuit Court of Appeals Rule 13(b)(3).

The undersigned Petitioners - Appellants certify that the following listed parties have an interest in the outcome of this case. These representations are made to enable judges of this Court to evaluate possible disqualification or recusal.

J. Lawerence Wright
Petitioner - Appellant

Cleta Wright
Petitioner - Appellant

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CITATION OF AUTHORITIES

STATEMENT OF PETITIONERS - APPELLANTS

This petition for rehearing and suggestion of reheering en banc of this Court's decision on July 23, 1986, affirming the District Court in United States of America v. Leland G. Stahl 792 F.2d 1438 (9th Cir 1986) and hereby, the tax court's decision in the instant case is respectfully brought because, in Petitioners' - Appellants judgment, the following points must be considered:

I. The Court appears to have overlooked a recent new decision in the law, Synar v. United States, 626 F.Supp. 1374 (D.D.C. 1986), decided February 7, 1986. The Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Graham-Rudman-Hollings Act was held to be unconstitutional because of improper delegation of powers between the executive and legislative branches of the

federal government. Under that ruling, Section 205 of the Revised Statutes of 1878, now found at 1 U.S.C., Section 106(b), the statute which delegates the power to certify ratification of a Constitutional amendment, a legislative function, to the Secretary of State, an executive officer, is also unconstitutional.

II. The Court has overlooked a material fact in that the record from the lower court in Stahl (supra) contains uncontroverted factual evidence of fraud on the part of government officials in the ratification of the Sixteenth Amendment to the United States Constitution, as compared to the record in Field v. Clark, 143 U.S. 649, 12 S.Ct. 425 (1892), the case relied on in the Stahl opinion, where there was merely an argument made suggesting the possibility

that fraud could happen, and Field must be read in the context of its own record when considering a contention of actual fraud here.

The questions presented in this case and the points raised in this petition for rehearing are of exceptional importance because of the effect the resolution of the issues will have upon the entire Nation. Therefore, appellants, J. Lawrence Wright and Cleta Wright, suggest a rehearing of the case en banc.

ARGUMENT

Recent New Decision in the Law

Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986), decided February 7, 1986, contains principles which affect the decision of this case. Synar involved questions of delegation of powers between the coordinate branches of the federal

government which affect the political question doctrine involved in this case, as follows.

This Court in Stahl cited Field v. Clark, 143 U.S. 649, 12 S.Ct. 425 (1892), and Leser v. Garnett, 258 U.S. 130 (1921), to decide that the issue raised by Stahl is a political question.

Field adhered to the enrolled act rule for authentication of the adoption of legislation by Congress, and under that rule the official attestations that legislation has passed Congress are made by legislative officers, the Speaker of the House of Representatives and the President of the Senate. Field, 143 U.S. at 672. A legislative act is also presented to the President of the United States for his signature, but he has no authority to approve a bill not passed by Congress. Id. Only the legislative

officers can attest to the passage of an act by Congress and the President must accept its passage upon their certification before he signs it. In the case of ratification of a Constitutional amendment, the President of the United States is not required to sign the amendment, and it is not passed by the houses of Congress but is proposed by Congress and then ratified by three-fourths of the States. The Secretary of State, a member of the executive branch, officially attests that the requisite number of States have ratified, rather than officers of Congress. The Secretary of State performs this function, which is legislative in nature, pursuant to section 205 of the Revised Statutes of 1878, now found in 1 U.S.C., section 106(b). The Supreme Court, in Leser, extended the Field enrolled act rule to

the certification and proclamation of a Constitutional amendment by the Secretary of State based on the authority granted to the Secretary by Congress in section 205. And, this Court in Stahl has cited Leger with approval, in stating that the enrolled act rule of Field must extend to the Secretary of State's certification of the amendment pursuant to the grant of authority to him in section 205. In extending the Field rule to this case, this Court has accepted language in Field pertaining to the possibility of fraud as controlling of this case.

However, the extension of Field to ratification of a Constitutional amendment based on the grant of power in section 205 must fail if section 205 fails. And, the constitutional validity of section 205 is squarely called into question by Synar.

The Court in Synar carefully examined the principles involved in delegation of powers between the branches of government, 626 F. Supp. at 1383-1391 and concluded that, though the general rule is that Congress cannot delegate legislative power to the executive branch, not every such delegation of power must automatically fail, and that in analyzing whether such delegation is acceptable, certain criteria must be met. Specifically, and most important to this case, is the question whether the grant of power contains standards clearly defining and confining the exercise of administrative discretion given to the executive branch in the particular grant of power. Id. at 1387. This principle if applied to section 205 which grants the Secretary of State the power to certify ratification of an amendment,

shows section 205 clearly to be deficient. Section 205 states simply that "official notice" must be received by the Secretary of State and then instructs him as to how to publish the certification. Section 205 contains no standards to determine what constitutes a sufficient ratification by a state legislature including whether the wording or punctuation could be changed or whether the amendment could be amended and contains no standards as to what constitutes official notice of ratification. In fact, the Memorandum between Secretary of State Knox and his Solicitor, on the record here[1], shows consultation between the two of them, both executive branch officers, as

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1. Memorandum - Office of the Solicitor, "Ratification of the 16th Amendment to the Constitution of the United States", Record Excerpts of Appellant, Filed with Appellant's Initial Brief, Excerpt 31-46.

to what constitutes valid ratification and valid notice. These executive officers, performing what was ruled to be a ministerial duty, Dillon v. Gloss, 256 U.S. 368, 41 S.Ct. 510 (1921), see, discussion Stahl's Reply Brief, p. 12-14, actually were able to exercise discretion because of the lack of standards and the imprecision in section 205. Synar, 626 F.Supp. at 1387. Ironically, that latitude in the statute gave rise to their opportunity to conspire to commit the fraud alleged here.

Such lack and imprecision in section 205 is grossly apparent if it is measured against the standards and precision held to be adequate in the Graham-Rudman-Hollings Act described in Synar, on pages 1387-1389.

Specifically, the Synar Court said:

"'We come, then, to what is the

> plaintiffs' principal argument on the excessive delegation point: that because of the lack of standards and the inherent imprecision of the duties conferred upon the administrators, the Act fails adequately to confine the exercise of administrative discretion. The search for adequate standards to restrict administrative discretion lies at the heart of every delegation challenge. The essential inquiry is whether the specified guidance "sufficiently markes the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will. Yakus, 321 U.S. at 425, 64 S.Ct. at 668.'
>
> Our consideration of this objection requires a careful review of the statute."

The delegation of power in section 205 is deficient under the reasoning of Synar and therefore Petitioners'-Appellants respectfully assert that this Court's reliance on section 205 to extend the Field rule to ratification of a Constitutional amendment in its ruling that the Sixteenth Amendment challenge is a political question in Stahl, and thereby the tax court's decision in the

instant case, is also deficient.

Material Fact Overlooked

This Court based its decision in Stahl on the premise that the question of fraud in the ratification of the Sixteenth Amendment to the United States Constitution is a political question primarily upon Field v. Clark, supra, as extended by Leser v. Garnett, supra. The Supreme Court decided Field in accordance with the enrolled act rule, as described above, which precludes inquiry by the Court into the validity of passage of that act. The argument was raised in Field that under such rule, the Court was leaving open the possibility that a bill never passed by Congress could be imposed upon the people. The Court stated that "possibility" was too remote to be seriously considered in the "present" inquiry, and termed the possibility as

only a "suggestion", and then said "[j]udicial action based upon such a suggestion is forbidden by the respect due to a coordinate branch of the government." Field, 143 U.S. at 672-673.

It is clear that in Field there was no fraud at issue. There was only an argument made by counsel that it would now be possible that a bill not actually passed could be foisted onto the people.

Appellants respectfully argue that the Court in Field was saying simply that the possibility of such a fraud was remote, and being remote could not be seriously considered in the Field inquiry where it was not actually raised. The Court did not say that it would not seriously consider an actual allegation of fraud in a different inquiry. This interpretation of the Court's statements is supported by the statement quoted above that "Judicial

action based upon such a suggestion is forbidden by the respect due to a coordinate branch of the government." The Court states clearly that it will not base a judicial intrusion into a coordinate branch upon a mere suggestion, however, it does not state whether it would act upon hard evidence on the record of actual fraud.

Stahl did not suggest the mere possibility of fraud. He placed on the record hard evidence, thus far uncontroverted. His, and Appellants', are cases which do justify intrusion into a coordinate branch.

The Court in Field immediately following does state that the evils that may result from the recognition of the enrolled act rule would be far less than those evils resulting from making the validity of Congressional enactments

depend upon the manner in which the journals of the respective Houses are kept. Field, 143 U.S. at 673 and 675. Those statements would appear to be applicable here; however, Appellants respectfully assert that this Court has overlooked material facts in accepting that language as controlling here in that the evidence of fraud in the Sixteenth Amendment goes far beyond "journals, loose papers of the legislature and parol evidence." Id. at 675. This Court has in fact stated several of the foremost examples of the evidence on the record in its footnote No. 1 on page A-19 of its opinion in Stahl.

Clearly, also the evidence of fraud here is in the proper format for presentation to the Court, and most importantly, is uncontroverted by the Appellee.

Appellants recognize that the goals of the Courts stated in Field to respect a coordinate branch of government and preserve order in government are laudable, however, such goals are not meant to be unyielding when up against a clearly established fraud affecting millions of people and depriving defendants of due process in both the civil and criminal arenas. The goal of protection of the people from such gross infringement is clearly greater than protecting order in government. The nation was founded by people escaping from this kind of infringement in other lands and it was never intended to be tolerated here, certainly not by the judiciary.

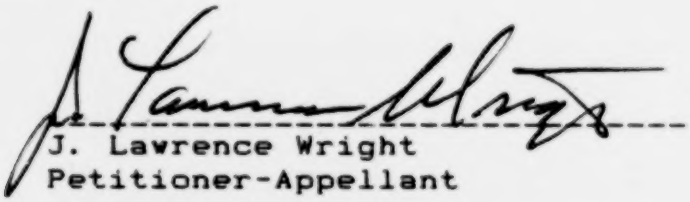
Appellants' challenge to the Sixteenth Amendment is not a political question under Field and Leser but must be heard

by the Court, because the Field enrolled act rule as extended by Leger could not have been intended to stand in the face of the evidence of fraud on the record here.

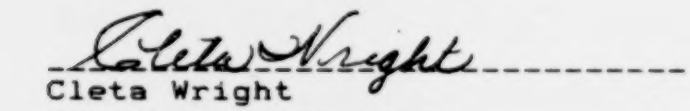
CONCLUSION

For the reasons stated herein, Petitioners-Appellants request that this petition for rehearing be granted and that the order of the Tax Court appealed from be reviewed by this Court sitting en banc.

Respectfully submitted this 19th day of September, 1986.



J. Lawrence Wright
Petitioner-Appellant



Cleta Wright
Petitioner-Appellant

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing was duly served by mail upon opposing counsel of record by causing the same to be mailed with sufficient postage to their address stated below on the 19th of September, 1986.

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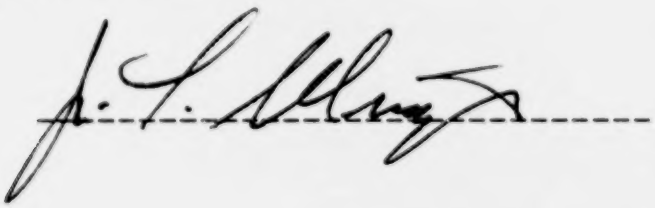

Filed November 13, 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. LAWRENCE AND CLETA WRIGHT	)	
	)	No. 85-7551
Petitioners-Appellants,	)	T.C. No. 27193-83
v.	)	
	)	ORDER
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	
Respondent-Appellee.	)	

Before: POOLE, NORRIS, and

REINHARDT, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, this petition for rehearing is denied and the suggestion for rehearing is rejected.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

J. LAWRENCE WRIGHT AND CLETA WRIGHT Petitioner,	)	Docket No. 27193-83
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER OF DISMISSAL AND DECISION

This case was recalled from the calendar for the Trial Session at San Francisco, California on June 24, 1985, at which time counsel for respondent filed a motion to dismiss for failure to prosecute properly and for entry of decision and a motion for award of damages under I.R.C. Section 6673. Petitioner J. Lawrence Wright appeared on behalf of petitioners, and the parties were heard on said motions. After due consideration, and for cause appearing in the transcript of the proceedings, it is

ORDERED that respondent's motion to dismiss is granted in that this case is dismissed for failure to prosecute properly. It is further

ORDERED and DECIDED that there are deficiencies in income tax due from petitioners for the taxable years 1980 and 1981 in the amounts of $5,169.00 and $7,563.00, respectively, with additions to tax for the taxable years 1980 and 1981 in the amounts of $258.45 and $378.15, respectively, pursuant to Section 6653(a)(1) of the Internal Revenue Code.

The deficiency in income tax in the amount of $7,563.00 for the taxable year of 1981 is an underpayment attributable to negligence or intentional disregard of the Rules and Regulations within the meaning of Section 6653(a)(1); accordingly, an additional amount as

provided by Section 6653(a)(2) equal to 50% of the interest payable on $7,563.00 shall be added to the tax. It is further

ORDERED and DECIDED that respondent's motion for damages under Section 6673 of the Internal Revenue Code of 1954, as amended, is granted, and the Court hereby awards damages to the United States Government in the amount of $1,500.00.

(Signed) Stephen J. Swift

Judge

Entered: JUL 24, 1985